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Fertility Fraud and Proposal for Florida Legislation

Cheyenne Dunn*

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I. INTRODUCTION

In America today, the trend of at-home mail-in DNA testing has become so commonplace that about one-in-seven U.S. adults have admitted to using one of these tests to find out more about their family history.¹ Due to the common use of this type of testing, we are more frequently in the media seeing stories about user's revelations about identity and newly discovered relatives abound.² Most engage in these tests, hoping to discover more about their health, their family history, and where they came from. However, for some Americans, these tests have revealed their origin story is the result of a dark secret involving a violation which has only now been discovered many years later. For some adults whose parents conceived them through the use of assisted reproductive technology, these tests are revealing that their father was not an anonymous sperm donor or their mother's husband, as many of them thought. Instead, they are revealing that the doctors who treated their mother in assisted reproductive procedures are their true biological fathers. In these cases, which have been labeled "fertility-fraud," a physician treating a woman for infertility has substituted his sperm in order to impregnate her, without her knowledge or consent. As news of these cases are just starting to gain attention of the families whose lives are forever changed, the law in a majority of states is not equipped to provide any sort of punishment to the perpetrator or relief to the victims, with only California, Indiana, and Texas passing laws dealing with this newly emerging crime of "fertility-fraud".³ This comment will discuss this emerging area of the law which is in its infant state; explore stories of the individuals who have been affected by the intentional acts of these physicians; analyze the existing legislation criminalizing these acts; discuss the public policy reasons for creating legislation regarding fertility fraud; and finally proposing possible legislative solutions that the state of Florida **should** adopt to allow relief for the victims of these crimes, as well as to provide criminal punishment for those doctors who have engaged in these acts.

¹Nikki Graf, *Mail-in DNA Test Results Bring Surprise About Family History for Many Users*, PEW RESEARCH CENTER, (Aug. 6, 2019) <https://www.pewresearch.org/fact-tank/2019/08/06/mail-in-dna-test-results-bring-surprises-about-family-history-for-many-users/>.

²*Id.*

³Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own*, N.Y. TIMES, Aug. 21, 2019 <https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html>.

II. BACKGROUND

A. ASSISTED REPRODUCTIVE TECHNOLOGY

Since its inception, assisted reproductive technology (ART) and similar techniques have been shrouded in secrecy. The first successful procedure done by Dr. Pancoast in 1884 was done under false pretenses towards the parents.⁴ The successful procedure was performed after the mother of the child was chloroformed and was done without either her or her husband's knowledge or consent.⁵ It would be nearly 100 years, however, before the first child would be born as a result of assisted reproductive technology with the birth of Louise Brown in 1978 in England.⁶ Since the birth of Louise Brown, more and more mothers and fathers have utilized ART to help them conceive a child. In fact, according to the Center for Disease Control's most recent data in 2017, 284,385 ART procedures were performed from the 448 reporting clinics in the United States resulting in 78,052 live infant births.⁷ ART is any fertility treatment in which the egg and the sperm are handled.⁸ While there are various means and methods of ART, most people are familiar with intrauterine insemination (IUI) and in vitro fertilization (IVF). IUI is a procedure where the sperm is placed directly into the uterus with the hopes being that the sperm will fertilize an egg within the uterus.⁹ IVF differs from IUI in that rather than inserting the sperm into the uterus with hopes of fertilization, the sperm and egg are fertilized outside of the uterus creating an embryo, which is then transferred to the uterus.¹⁰

⁴Jody Lynne Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 LAW & INEQ. 45, 48 (Winter, 2019).

⁵*Id.*

⁶Steve P. Calandrillo & Chryssa V. Deliganis, *In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough*, 57 ARIZ. L. REV. 311, 314 (2015).

⁷ART Success Rates, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/artdata/index.html> (last visited Jan. 22, 2020).

⁸Infertility, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/drc-20354322> (last visited Nov. 9, 2019).

⁹Intrauterine insemination (IUI), MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722> (last visited Nov. 9, 2019).

¹⁰In vitro fertilization (IVF), MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> (last visited Nov. 9, 2019).

Both of the aforementioned forms of ART are extremely invasive, requiring insertion into the uterus, sometimes on one or more occasions per procedure. IVF itself is a long process, requiring multiple steps of ovarian stimulation, egg retrieval, sperm retrieval, fertilization, and embryo transfer.¹¹ Aside from the various steps, oftentimes with IVF, various medications will have to be taken for things such as ovarian stimulation; oocyte maturation; preventing premature ovulation; and to prepare the lining of the uterus, some of these having to be injected into the body.¹² Even before the procedure can begin, various tests must be done for things such as ovarian nerves, infectious disease screening, mock embryo transfer, and a uterine exam.¹³ Additionally, the process itself for IVF is extremely extensive. Ovarian stimulation can take between one to two weeks before the egg retrieval can take place.¹⁴ Sperm retrieval must also be done before the fertilization process, which itself must be done before the embryo transfer, occurring usually two to five days after the egg retrieval.¹⁵ Then twelve weeks later, a blood test may be done to determine if the implantation resulted in pregnancy.¹⁶ If the implantation was unsuccessful, then the parties must repeat the process over again.

B. LACK OF REGULATION

While ART is used as a common means for conception amongst many families today, relatively few federal laws in the United States are concerned with regulating assisted reproductive technology, and no single federal agency is charged with oversight of the fertility industry.¹⁷ Various factors play into the lack of federal regulation, including the market-oriented outlook on reproduction that wants as little government control as possible, the politics of abortion that loom over any efforts to federally regulate reproduction, and the claim of the industry that there is sufficient self-regulation.¹⁸ These “self-regulators” that exist within the

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*In vitro fertilization (IVF)*, *supra* note 10.

¹⁷Naomi Cahn, *When Fertility Clinics Get It Wrong*, FORBES, (Aug. 8, 2019, 7:51 am) <https://www.forbes.com/sites/naomicahn/2019/08/08/when-fertility-clinics-get-it-wrong/#5c80eacf1f4a>.

¹⁸*Id.*

industry are essentially two professional organizations: The Society for Assisted Reproductive Technology (SART) and the American Society for Reproductive Medicine (ASRM).¹⁹ Every clinic which performs IVF is invited to join SART and to remain in good standing they must report data about the procedures they do, along with following the recommendations SART issues.²⁰ However, doctors are not required to follow these recommendations issued by SART, they do not even have to obtain approval prior to performing new procedures on patients in clinics.²¹

Despite the lack of federal regulation, a few federal agencies do exercise some form of oversight into the industry.²² For example, the Center for Disease Control is granted statutory authority under the Fertility Clinic Success Rate and Certification Act.²³ Under this act, the Center for Disease Control reports pregnancy success rates achieved by clinics and the identity of the reporting labs and whether or not they are certified.²⁴ The Act allowed for the creation of the criteria which a lab must meet in order to qualify for certification, however, it required only that the criteria for the certification program be distributed to the States and that they be encouraged to adopt it, not required.²⁵ Additionally, the Act specifically requires the certification program not have any “regulation, standard, or requirement which has the effect of exercising supervision or control over the practice of medicine in assisted reproductive technology programs.”²⁶ Furthermore, reporting of a clinic’s pregnancy success rates is not mandatory and clinics may continue to operate regardless as to whether or not they report to the Center for Disease Control.²⁷ In addition to the Center for Disease Control, the Food and Drug Administration screens human donors and tissues for infectious disease and risks of communicable diseases

¹⁹Ellie Kincaid, *A booming medical industry in the US is almost totally unregulated*, BUS. INSIDER (July 7, 2015, 3:50 pm) <https://www.businessinsider.com/assisted-reproduction-ivf-industry-regulation-2015-6>.

²⁰*Id.*

²¹*Id.*

²²See Cahn, *supra* note 17; see Calandrillo & Deliganis, *supra* note 6, at 330.

²³Calandrillo & Deliganis, *supra* note 6, at 330.

²⁴See Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 493, § 2 (a)(1)-(2) 106 Stat. 3149 (1992).

²⁵See *Id.* at § 3(a)-(b).

²⁶Fertility Clinic Success Rate and Certification Act of 1992 § 3(i).

²⁷Cahn, *supra* note 17.

and has limited regulation surrounding cloning and the classification of medical devices used in assisted reproduction.²⁸

C. “FERTILITY FRAUD” – A CRIME IN ITS INFANT STATE

In recent years, consumer DNA test kits have become more and more prevalent amongst Americans.²⁹ The use of the at-home kits has brought many instances of fertility fraud to light. The most well-known case which brought fertility fraud to the mass media was the case of Dr. Cline who practiced in Indianapolis and used his sperm to impregnate nearly three dozen women in the 1970s and 1980s, resulting in at least sixty-one children.³⁰ One of the first of Dr. Cline’s children to learn his secret was Jacoba Ballard.³¹ Ballard, unlike some of Dr. Cline’s other children, knew she had been conceived from a sperm donor, and in an attempt to learn more about her family and find potential half-siblings, joined an online forum for other children conceived by sperm donors and adoptees.³² Together with other half-siblings, Ballard built a giant family tree by looking through public records and social media profiles, along with asking genetic matches about their families to build a family tree to lead to their father.³³ When they realized a connection that possibly led back to Cline, one of the half-sisters reached out to Cline’s children whom he had raised with his wife.³⁴ His son helped arranged a meeting between Cline and six of the children, where at seventy years old, he admitted to using his own sperm and that the records had been destroyed years ago.³⁵ This information about their origin left Ballard and her half-siblings with conflicting feelings and questions as to Dr. Cline’s motive behind making this choice for so many years so long ago.³⁶ Ballard questioned could the dark impulse

²⁸See Cahn, *supra* note 17; see also Calandrillo & Deliganis, *supra* note 6, at 330.

²⁹Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own*, N.Y. TIMES, (Aug. 26, 2019) <https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html>.

³⁰See Mroz, *supra* note 29.

³¹Sarah Zhang, *The Fertility Doctor’s Secret*, THE ATLANTIC (March 18, 2019, at 5:23 p.m.) <https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249/>.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

that caused this doctor to lie to his patients be inside of her too?³⁷ One sibling questioned whether he was attempting to implement a master race or control over the region, one felt they were simply a science experiment, and one felt that perhaps it was a god complex that led to his decision.³⁸

Dr. Cline's case is perhaps the well-known of the fertility fraud cases as it is the motivation behind Indiana passing state statute § 34-24-5-2, which makes using the wrong sperm a felony and gives victims the right to sue the doctors for it.³⁹ However, the acts of Dr. Cline are not the only ones which have come to light that resulted in a legislative change. Eve Wiley of Dallas Texas was going through her mother's emails when she discovered correspondence between her mother and Sperm Donor No. 106, which is how she discovered that she was conceived by a sperm donor.⁴⁰ Eve Wiley developed a "father-daughter relationship" with her biological father in which they spent the holidays together and led to him officiating her wedding.⁴¹ However, when Wiley's son Hutton was born with significant medical issues she and her husband used popular DNA testing sites 23andMe.com and Ancestry.com to gain more information about their genetics. It was through this that Wiley learned Donor No. 106 was not her biological father, but instead was her mother's fertility doctor.⁴² That left Wiley to not only have to disclose to her mother that the doctor used his sperm rather than the donor sperm which she and her husband had agreed to without their knowledge, but to also inform the man she believed to be her biological father what had occurred as well.⁴³ Sadly, Wiley has stated she has met others like her who have discovered they have a "doctor daddy."⁴⁴ Texas Penal Code 22.011 now includes a provision specifically referring to the acts akin to those of Dr. Cline and Wiley's true biological father.⁴⁵

³⁷Zhang, *supra* note 32.

³⁸*Id.*

³⁹See IND. CODE ANN. § 34-24-5-2 (LexisNexis 2019); Mroz, *supra* note 29

⁴⁰Robert T. Garrett, *ABC's '20/20' features Dallas Woman who found out her mother's fertility doctor is her father*, DALLAS MORNING NEWS, (May 3, 2019 at 10:45 a.m.) <https://www.dallasnews.com/news/politics/2019/05/03/abc-s-20-20-features-dallas-woman-who-found-out-her-mother-s-fertility-doctor-is-her-father/>.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵See TEX. PENAL CODE ANN. § 22.011 (2019).

While the cases of Jacoba Ballard and Eve Wiley have enacted changes to their state's legislation, many other cases of these types of "doctor daddys" who have been discovered to have substituted his sperm unbeknownst to his patients which resulted in children, with various examples of these acts becoming known in recent years. For example, a couple in Florida filed a lawsuit on December 4, 2018, in Vermont against a physician who inseminated Cheryl Rousseau with his sperm, rather than that of an unnamed medical student who resembled Rousseau's husband and had characteristics which they required.⁴⁶ Like many of Dr. Cline's donor children, the Rousseau's discovered after their daughter sought information about her biological father via DNA testing.⁴⁷ Kelli Rowlette, a resident of Washington state discovered that her DNA did not match her father but rather Dr. Gerald E. Mortimer, the fertility specialist who treated her mother, now Sally Ashby in the 1980's when she and Rowlette's father Howard Fowler, had difficulty conceiving a child on their own.⁴⁸ Instances of fertility fraud are not limited to the United States alone but have occurred worldwide. A fertility doctor in Canada was disciplined in 2019 after he was discovered to have inseminated at least eleven women with his sperm in the 1970s.⁴⁹ Dr. Barwin was discovered having used his sperm to impregnate patients when in 2015 one of the conceived children did a DNA test in an attempt to discover her genealogy, compared her DNA tests with the child of another patient who developed celiac disease, which neither of her parents had.⁵⁰ Dutch fertility doctor, Dr. Karbaat, was discovered to have fathered forty-nine children using his sperm at his clinic which closed in 2009 amid allegations Dr. Karbaat had falsified data,

⁴⁶Lisa Rathke, *Florida couple sue, accused doctor of impregnating woman with his sperm*, ORLANDO SENTINEL, (Dec. 28, 2018, at 7:05 p.m.) <https://www.orlandosentinel.com/news/os-ne-florida-insemination-lawsuit-20181228-story.html>.

⁴⁷*Id.*

⁴⁸Tatyanna Bellamy-Walker, *Fertility Doctor Impregnated Patient With His Own Semen*, Daily Beast, (April 2, 2018, at 9:16 p.m.) <https://www.thedailybeast.com/fertility-doctor-impregnated-patient-with-his-own-semen-lawsuit>.

⁴⁹Elisha Fieldstadt, *Fertility Doctor accused of impregnating at least 11 women with his own sperm*, NBC News, (June 27, 2019, at 10:27 a.m.) <https://www.thedailybeast.com/fertility-doctor-impregnated-patient-with-his-own-semen-lawsuit>.

⁵⁰*Id.*

analyses, and donor descriptions and exceeded the permitted number of six children per donor.⁵¹

One may be asking how it would be possible for the patients to know so little about the sperm donors whom they were receiving their sample from, or how there is little if any records of the donors or the procedures that were done. ART has been shrouded in secrecy and deceit since the practice began, with the first successful procedure being performed after the patient was chloroformed and secretly inseminated while six medical students looked on.⁵² The physician who performed the procedure never disclosed to the husband or wife what took place, that was left to one of the student witnesses to do by notifying the child that came from that procedure twenty-five years later.⁵³ When fertility treatment was relatively new in the 1970s, 1980s, and 1990's when many of the fertility fraud crimes that are coming to light took place, patients were told little if anything about the other man, except that he would likely be a medical student.⁵⁴ The secrecy was in part from uncertainty over who would be the legal father of a donor-conceived child, a question that had not been resolved in the laws of many states.⁵⁵ However, there was also a fear of psychological harm, "the child might feel rejected, the sterile husband might feel humiliated, and the wife might be condemned as an adulteress."⁵⁶

III. ISSUE

Currently, only California, Indiana, and Texas have legislation criminalizing fertility fraud in some form, with Pennsylvania, Nebraska, and New York having bills pending in their legislatures.⁵⁷ Florida, like many other states, not only lacks legislation criminalizing fertility fraud, with the current laws lacking the adequate protection and remedies for victims; and the adequate deterrents for offenders.

⁵¹*Dutch fertility doctor used own sperm to father 49 children, DNA tests show*, BBC, (Apr. 12, 2019) <https://www.bbc.com/news/world-europe-47907847>.

⁵²See Madeira *supra* note 5 at 48.

⁵³*Id.*

⁵⁴Dov Fox et al., *Fertility Fraud, Legal Firsts, and Medical Ethics*, 134 OBSTETRICS & GYNECOLOGY 918 (Nov. 2019).

⁵⁵Zhang, *supra* note 32.

⁵⁶*Id.*

⁵⁷See IND. CODE ANN. § 34-24-5-2 (LexisNexis 2019); TEX. PENAL CODE ANN. § 22.011 (2019); CAL. PENAL CODE § 367g (Deering 2020); H.B. 2029, 203d Gen. Assemb., Reg. Sess. (Pa. 2019); S.B. 6720, 242d Ann. Legis. Sess. (N.Y. 2019); L.B. 748, 106th 2d Ann. Legis. Sess. (Neb. 2020); .

A. CIVIL CLAIMS

Given the current legislature in place at this time, possible civil remedies open to victims of fertility fraud include: 1) medical malpractice; 2) fraud; and 3) battery. However, each cause of action is insufficient to provide adequate relief for the victims of fertility fraud.

i. Medical Malpractice

Medical malpractice in the state of Florida occurs when a “healthcare professional

breaches the prevailing professional standard of care for that health care provider.”⁵⁸ The prevailing professional standard of care for a given health care provider is the level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar healthcare providers.”⁵⁹ Therefore, for a plaintiff to prevail against a health care provider in an action for medical malpractice, they must prove: (1) a duty by the physician; (2) a breach of that duty, and (3) causation.⁶⁰ The duty owed by the physician requires them to act within the standard of professional care, which is the level of care, skill, and treatment that, in consideration of all surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably prudent health care providers.

⁶¹ If they fail to provide the care of a reasonably prudent physician, they breach the duty owed to that patient.⁶² An injured patient has two years to bring a claim for medical malpractice from the date the incident giving rise to the injury occurred or within two years from when the incident was discovered or should have been discovered by due diligence.⁶³ In the case where fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury, then the statute of limitations is extended forward two years from the time the injury is discovered or should have been discovered with due diligence, but should not be commenced later

⁵⁸FLA. STAT. ANN. § 766.102(2)(a) (LexisNexis 2019).

⁵⁹*Id.*

⁶⁰*Saunders v. Dickens*, 151 So. 3d 434, 441(Fla. 2014).

⁶¹*Id.*

⁶²*Id.*

⁶³FLA. STAT. ANN. § 95.11(4)(b) (LexisNexis 2019).

than seven years from the date of the incident giving rise to the injury occurred.⁶⁴

Under the current Florida law, medical malpractice is an inadequate cause of action to seek relief or punishment for the act of fertility fraud. It would not be particularly difficult to prove that a fertility specialist who commits fertility fraud has committed malpractice. Clearly, substituting his genetic material rather than that which the patient had consented to and doing so without the patients' consent, was not acting as a reasonably prudent healthcare provider. However, the statute of limitations in which an injured party has to bring a claim is particularly difficult for a claim of fertility fraud to overcome.

Florida allows two years from when the incident occurred or when one should have reasonably discovered the injury, extending for two years for the use of fraud to cover up the malpractice, but not allowing a claim to be brought more than seven years after the incident occurred. This is problematic due to the length of time fertility fraud is typically concealed for and for how long it takes for the patient to learn they were injured. In the reported incidents of fertility fraud, the discovery has not been made of the physician's actions until well into the resulting child's adulthood. If the date at which the injury occurred is determined to be the date the procedure which resulted in the conception of the child was performed, claims for medical malpractice would be barred under the current seven-year limitation in Florida. Parents do not tend to undergo DNA testing of their child after they are born when they have received ART to produce said child, and as such, they would have no way of ever knowing that the child resulted from fertility fraud unless a DNA test was done in the future, as is the case in many of the reported incidents of fertility fraud thus far reported.

ii. Fraud

A cause of action for fraud requires the injured party to prove: (1) there was a misrepresentation of fact; (2) the person making the false statement knew that the statement was false, did not know whether or not the statement was true, or should have known the statement was false; (3) the statement was made with the intent to induce the other to rely on the statement; and (4) the other party

⁶⁴*Id.*

suffered by acting in justifiable reliance on the statement made.⁶⁵ A legal or equitable action founded on fraud must be brought within four years of the time when the fraud was discovered or should have been discovered with exercise of due diligence, and in any event must be brought within twelve years of the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.⁶⁶

A claim of fraud would be difficult to bring against a physician committing fertility fraud due to difficulties the patients would have in satisfying the elements and due to the statute of limitations period. Most known instances of fertility fraud thus far occurred during the 1970s and 1980s.⁶⁷ Given the thirty to forty-year gap between the act by the physicians and the discovery of their actions, many of the records from that time have likely been destroyed if any were kept at all.⁶⁸ This becomes important in proving the second and third elements of fraud. Without documentation and the admission of the physicians themselves, it may difficult to prove their state of mind or the circumstances which led them to commit fertility fraud.

For example, for the second element, the patient would likely need to prove whether or not the physician knew at the time he informed the patient he would be using that genetic material which was consented to, that he would instead be using his genetic material. Without the admission of the physician or any documentation, it would be difficult to prove the state of mind at the time. Multiple reasons could have occurred for the fertility fraud, including the physician having a god complex, a want to make his patient happy with a resulting pregnancy which required the freshest sperm available, or even if something went wrong in which the

⁶⁵Miller v. Sullivan, 475 So. 2d 1010, 1011-12 (1st Fla. Dist. Ct. App. 1985).

⁶⁶FLA. STAT. ANN. § 95.11(3) (LexisNexis 2019); FLA. STAT. ANN. § 95.031(2)(a) (LexisNexis 2019).

⁶⁷See, Zhang, *supra* note 32 (Dr. Cline's clinic opened in 1979 and based on the births of the youngest children it appears that he stopped using his own sperm in the 1980s.); Rathke *supra* note 48 ("Couple is accusing a retired Vermont doctor of artificially inseminating the woman with his own sperm rather than that of a donor in the 1970s."); Bellamy-Walker, *supra* note 50 (Kelli Rowlette's mother became pregnant with her in 1980 after Dr. Mortimer used his own sperm for the procedure.); and Fieldstadt, *supra* note 51 (Dr. Norman Barwin began inseminating women with his own sperm in the 1970s.).

⁶⁸See Zhang, *supra* note 32 ("1977 survey found that more than half of the doctors did not even keep records, so as to leave no paper trail connecting donor and child." Dr. Cline admitted when meeting with a group of the children he fraudulently conceived "to using his own sperm but said the records had been destroyed years ago.).

donor sperm was no longer able to be utilized.⁶⁹ Additionally, had the physician informed the patient that it would be anonymously donated genetic material and that is what the patient agreed to, it could be argued that there was no misrepresentation, as the genetic material as from an anonymous donor, the donor being the physician. The third element of fraud would be difficult to satisfy for the same reason. If the physician perhaps intended to use true donor sperm or the selected sperm and at the last minute, in an attempt to save the procedure and possible pregnancy decided to use his genetic material, it would not have been inducing the patient to rely on his statement to go through with the procedure.⁷⁰ The fourth element could prove difficult for a patient to satisfy, as they would have to convince they suffered as a result of the physician's conduct when the purpose of the procedure is to produce a child, which from the physician's conduct ultimately occurred. One could possibly make the argument that the would-be parents did suffer psychologically as a result of the genetic material coming from a physician rather than an anonymous donor. However, that argument would still have to overcome the statute of limitations obstacle described below.

While fraud has the longest statute of limitations of the tort claims explored thus far, bringing a claim within the statute of limitations, even the twelve-year statute of repose period, would provide difficulty for the victims. As previously discussed, due to the nature of fertility fraud, it is not brought to the attention of the victims until much longer after the crime occurs, usually when the resulting child is in their twenties or thirties.⁷¹ The resulting child,

⁶⁹See, Zhang, *supra* note 32 (Discussing what caused Dr. Cline to use his own sperm in his patients one of the children resulting from those procedures gave the reason for his actions as being a "God Complex." Procuring sperm during the time which Dr Cline committed Fertility fraud was much more "tedious and time-sensitive". Fertility specialist in Indiana who knew Dr. Cline in discussing his action stated he could understand the "reluctance to disappoint a patient" acknowledging it is disappointing if the sperm donor is unable to come because of an emergency resulting in having to delay the procedure a month.); Mroz *supra* note 29 (Dr. Madeira stated that the actions of these doctors could have "self-justified their malfeasance in an era of 'doctor knows best.'" She stated, "in their minds, they may have been helping their patients by increasing their chances of getting pregnant with fresh sperm for higher fertilization rates.); Fox et. al *supra* note 55 ("By using fresh sperm, they yielded higher fertilization rates than had they used frozen sperm.").

⁷⁰See sources cited *supra* note 70.

⁷¹See, Zhang, *supra* note 32 (Heather Woock was thirty-three when she took a DNA test and began receiving messages from relatives revealing she was a secret child of Dr. Cline. Jacoba Ballard was also thirty-three when she and

whose personal identity is disrupted upon the discovery of how they came to be conceived, would not have a viable cause of action as the misrepresentation of fact was not made to them, it was not made to induce them to rely on the statement, and they did not detrimentally rely on the statement.⁷² Due to the difficulty in proving the elements, the inadequate statute of limitations period, and the lack of relief provided for the resulting child, fraud fails to provide the remedy needed by victims of fertility fraud.

iii. *Battery*

For a party to establish the intentional tort of battery occurred, the plaintiff must prove: (1) the defendant made contact with the plaintiff; (2) that contact was intentional; and (3) the contact was harmful or offensive.⁷³ The test to determine whether or not contact was offensive is whether or not it “would be offensive to an ordinary person not unduly sensitive to personal dignity.”⁷⁴ It has been established when a physician operates without the express or implied consent of the patient, the physician commits a battery... for which they are liable for damages.⁷⁵ This rationale prevents a surgeon from “performing an operation different in kind from that consented to or one involving risks and results not contemplated.”⁷⁶ An action for battery must be brought within four years of the date of the battery occurring.⁷⁷

Battery, like medical malpractice, is insufficient as a cause of action for victims of fertility fraud due to the short statute of limitations in place to bring a claim. When a physician uses his genetic material, rather than that agreed upon by the patient, without the patient’s knowledge or consent, his actions fall within conduct

other half siblings began searching through public records to build a family tree which lead to Dr. Cline. Matthew White, another of Dr. Cline’s secret children, was also in this thirties when he discovered the news regarding who his biological father was actually Dr. Cline.); Bellamy-Walker, *supra* note 50 (Kelli Rowlette was thirty-six years old when she sent her DNA to Ancestry.com and found out that her biological father was Dr. Gerald E. Mortimer.); Mroz *supra* note 29 (“Those who discover the identity of their biological fathers in these cases are usually adults.”).

⁷²See Miller, 475 So. 2d 1011-12.

⁷³Chorak v. Naughton, 409 So. 2d 35, 39 (2d Fla. Dist. Ct. App. 1981).

⁷⁴Paul v. Holbrook 696 So.2d 1131, 1132 (5th Fla. Dist. Ct. App. 1997).

⁷⁵Chambers v. Nottenbaum, 96 So. 2d 716, 718 (3d Fla. Dist. Ct. App. 1957) (citing Wall v. Brim 138 F.2d 478 (5th Cir. 1943)).

⁷⁶*Id.*

⁷⁷FLA. STAT. ANN. § 95.11(3)(o) (LexisNexis 2019).

which would qualify as battery under the current Florida statute. By performing the procedure, the physician makes intentional contact patient which would be offensive to an “ordinary person” given genetic material which the patient did not agree to is being physically inserted into her body.⁷⁸ Given that the doctor is using their own genetic material without asking the patient first, the operation which is “performing an operation different in kind from that consented to.”⁷⁹ The resulting child being that of the doctor treating them is certainly a “risk and result not contemplated” by the patient prior to the receiving the procedure.⁸⁰ However, given the nature of fertility fraud and the fact that it is not discovered until long after two years when the battery would have occurred, the time for the victims to bring a cause of action will have long passed when the patient becomes aware that the assault has occurred.⁸¹ Additionally, as the statute requires contact to have been “made against the plaintiff” this claim would only be available to the patient who received the treatment; their families and the resulting child would not be able to pursue this as a means for recovery.⁸² The limitation of who can bring a claim, along with the statute of limitations being so short it most likely will have expired when the fertility fraud becomes apparent. Therefore, battery does not provide an adequate cause of action for victims of fertility fraud.

B. CRIMINAL CLAIMS

i. *Sexual Battery*

Florida Statute 794.011(1)(h) defines sexual battery as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose”.⁸³ The statute of limitations to bring a charge of sexual battery varies slightly depending on various situations. For a first- or second-degree felony charge on a victim sixteen years or older where the incident was reported within

⁷⁸See Paul, 696 So. 2d 1131 at 1132.

⁷⁹See Chambers, 96 So. 2d 716 at 718.

⁸⁰See *id.*

⁸¹See sources cited *supra* note 71.

⁸²See Chorak, 409 So. 2d at 39.

⁸³FLA. STAT. ANN. § 794.011(1)(h) (LexisNexis 2019).

seventy-two hours after the offense may be brought at any time.⁸⁴ Otherwise, a charge for a first- or second-degree felony charge must be brought within eight years after the violation is committed.⁸⁵ There are some discovery rule statute extenders, such as allowing a charge for sexual battery to be brought any time after the date of the accused is established or should have been established with due diligence through DNA evidence if a sufficient portion was collected at the time of the original investigation and preserved for testing by the accused.⁸⁶

Florida's current sexual battery statute, as currently written, likely will impose a significant hurdle preventing victims from prevailing in an action for sexual battery. Due to the fact that there is no clear definition as to what qualifies as a bona fide medical purpose, this allows significant leeway for the perpetrating physician to make the argument their conduct does not qualify as sexual battery under the statute.⁸⁷ If what qualifies as a bona fide medical purpose is controlled by the purpose of the procedure itself, then this would provide a defense to a physician who commits fertility fraud.⁸⁸ If it is determined that the physicians' intent for the procedure to be for the bona fide purpose of impregnating the patient regardless of the source of the sperm being used, this too could provide a defense for the physician.⁸⁹ If a patient did not agree to the use of a particular donor, the fact that by the physician donating his own sperm but this being unknown to the patient could be argued

⁸⁴FLA. STAT. ANN. § 775.15(14)(a) (LexisNexis 2019).

⁸⁵FLA. STAT. ANN. § 775.15(14)(b) (LexisNexis 2019).

⁸⁶FLA. STAT. ANN. § 775.15(15)(a) (LexisNexis 2019); FLA. STAT. ANN. § 775.15(16)(a) (LexisNexis 2019).

⁸⁷*See* 3 Florida Criminal Defense Trial Manual § 19.3(f) (Matthew Bender) (Discussing how some terms and phrases within the statute are not as clear and more "indefinite in nature". Noting, for example, "legitimate treatment or technique utilized by a licensed medical doctor, whether in his office or in the hospital, obviously would be in this meaning." However, also noting that "matters of fraud or intent must be reckoned with" and that "a particular fraud that misrepresented the act being done would be fraud in factum which then would properly vitiate whatever consent had been given under the guise of medical treatment." The statute is ambiguous as to whether the act accomplished must be for a bona fide medical purpose or if whether "the actor intends a bona fide medical purpose regardless of the fact" would be sufficient to keep it from being sexual batter, but that reference to the mens rea element [] should demonstrate the intent of the actor is controlling.").

⁸⁸*Id.*

⁸⁹*Id.*

that makes the donor still anonymous, still allowing their conduct to fall under the provision of the statute as currently written.⁹⁰

Having sexual battery as a means of pursuing justice for the victims is especially important for the original patients of the treating doctor, the mothers.⁹¹ ART is an extremely invasive procedure, resulting in months if not years of the patient being treated by a doctor.⁹² If the physician used his genetic material during multiple treatments, the patient would have been violated and assaulted on more than one occasion. To be able to hold the physician accountable for a charge of sexual battery would help to preserve the view society has regarding a violation of this nature.⁹³ However, sexual assault would only be a means of achieving justice for the mothers and would leave the spouses and resulting children without a route to pursue.⁹⁴ Additionally, the statute of limitations poses issues. The statute of limitations for sexual battery is infinitely extended only in two instances, but the requirements are not ones that work in accordance with fertility fraud.⁹⁵ Fertility fraud is likely never going to be reported within seventy-two hours after the battery is commenced, nor is DNA evidence collected from the time of an original investigation and preserved for testing by the accused.⁹⁶

⁹⁰*See id.*

⁹¹*See*, Zhang, *supra* note 32 (Liz White who was treated by Dr. Cline stated since learning of the truth of her son's conception "I feel like I was raped fifteen times."); Mroz, *supra* note 29; Cha, *supra* note 95 (Jacoba Ballard who is one of the children resulting from Dr. Cline's conduct, equated what he did to an "offense akin to rape" and stated he "took advantage of her [mother] in one of the most vulnerable moments of her life.")

⁹²*See*, Zhang, *supra* note 32 (Liz White was inseminated by Dr. Cline fifteen times over five months.); *See also*, Mroz *supra* note 29 (Texas legislator discussing how fertility fraud constitutes as an assault, "There is a physical aspect to it – there is a medical device that is being used to penetrate these women to deliver the genetic material.")

⁹³*See*, Mroz *supra* note 29 (When Dr. Cline's actions were discovered "prosecutors were not able to press for a tougher sentence for a simple reason: In Indiana, as in most states, there were no laws prohibiting his conduct."). Zhang, *supra* note 32 ("It was a breach of trust between a physician and his patient. One could say immoral."); Fox et. al., *supra* note 55 ("Fertility fraud exploits positions of power and betrays patients' trust to deceive them in ways that hid key facts about medical procedures. This practice prevents patients from being able to accept or decline treatment based on that material information about relevant risk and benefits.").

⁹⁴*See* 3 Florida Criminal Defense Trial Manual § 19.3(f) (Matthew Bender) ("Victim" means a person who has been the object of a sexual offense.").

⁹⁵*See* sources cited *supra* note 87; *See also* sources cited *supra* note 72.

⁹⁶Given the fact that the crime of fertility fraud is not discovered until the resulting child is an adult, this makes complying with the requirements to

Due to this, the time in which a claim could be brought would be eight years from the date the violation is committed, which in the instance of fertility fraud will pass long before the victims will most likely discover a violation occurred in the first place.⁹⁷

Therefore, with the current statutory language regarding the definition of sexual battery and the statute of limitations, along with being limited to only one of the class of victims, sexual battery fails as a sufficient means pursuing justice for fertility fraud.

C. SUMMARY

Despite there being various claims, which victims of fertility fraud could attempt to pursue with the current Florida Statutes, each fall short in their own way. Each cause of action has an inadequate statute of limitations period which is not sufficient enough to allow a victim of fertility fraud to bring a claim once the truth has been discovered. Additionally, fraud and sexual battery present difficulties in satisfying the required elements of the claims given the nature of fertility fraud. As well, no one cause of action provides an opportunity for all victims of fertility fraud, the mother, the spouse, and the resulting child, to bring a claim against the offending treating physician. As such, current Florida legislation is insufficient to provide adequate relief to the victims of fertility fraud, leaving a need for a change or addition to the laws currently in place.

IV. PUBLIC POLICY

Fertility fraud is committed by those whom our whole lives we are raised to trust and believe are honorable, caring people, during a procedure which is very intimate both physically and emotionally. This crime violates various ideals and Florida needs to ensure that there is proper protection and deterrence in place to prevent future instances of fertility fraud and to ensure that the first victim's instance that occurs in the state, will not be left without means to pursue punishment or relief.

infinitely extend the statute of limitations impossible. *See* sources cited *supra* note 72.

⁹⁷*See* sources cited *supra* note 72.

A. PHYSICIAN-PATIENT RELATIONSHIP

Fertility fraud violates core ethical duties for doctors to use their own sperm to inseminate patients without their understanding or agreement.⁹⁸ Physicians hold a title that comes with the respect that comes with other occupations such as lawyers, law enforcement officers, and public officials. As a society, we expect those employed in these public service positions to be truthful, noble, and honest people. Physicians are entrusted with perhaps the most valuable things to a member of society, their health, and their life. They are entrusted with care often when someone is in a vulnerable state, sometimes in severe distress, and sometimes even while unconscious. Intimate details are shared with physicians with the expectation that they will be maintained only between the physician and the patient. It is clear physicians are highly trusted members of our society, and as such, when they violate that trust it not only affects the patient with whom has been violated but it also violates society as a whole.

Fertility fraud exploits positions of power and betrays patients' trust to deceive them in ways that hide key facts about medical procedures.⁹⁹ Patients will expect their doctor to truthfully inform them of all of the details of the procedure, along with the risks and dangers that go along with it.¹⁰⁰ In Florida, for example, a patient is considered to be informed when a reasonable person under the circumstances would have a general understanding of the treatment, risks, and dangers involved.¹⁰¹ In all instances of fertility fraud, the physicians were informing the patients the sperm was coming from one source, whether it be a random medical student, a donor with traits important to the patient, or even the patient's spouse, when in fact it was coming from the physician themselves.¹⁰² These patients

⁹⁸See Fox et al., *supra* note 55 at 919.

⁹⁹*Id.*

¹⁰⁰See source cited note 102 *infra*.

¹⁰¹Gassman v. US, 589 F. Supp. 1534, 1545 (M.D. Fla. 1984).

¹⁰²See, Zhang *supra* note 32 (Liz White was told by Dr. Cline that he would use sperm of a medical student "whose appearance and blood type matched [her] husband's." Another one of Dr. Cline's children called "Amy" was supposed to be conceived using her father's sperm (her mother's husband) but instead substituted his own. This was also the case for another of the children called "Tyler".); Garrett *supra* note 41 (Eve Wiley's mother selected Donor Number 106 to be used for insemination but instead the physician used his own sperm.); Rathke *supra* note 47 (Cheryl Rousseau was to be inseminated with "donor sperm from an unnamed medical student, who resembled Rousseau's husband and had characteristics that she required."); Bellamy-Walker *supra* note 49

trusted their physicians with a very intimate, physical, and potentially life-changing procedure. The intentional omissions of the physicians led the victims of fertility fraud to consent to the ART procedure, not to the performance with the physician's sperm.¹⁰³

Additionally, by committing fertility fraud physicians engage in sexual relations with his patient.¹⁰⁴ A physician who does this violates his basic fiduciary rights, even if the patient is under anesthesia and never finds out.¹⁰⁵ Physician-patient sexual relations are inherently problematic when the physician uses or exploits trust, knowledge, emotions, or influence derived from the professional relationship.¹⁰⁶ Women who undergo ART often are doing so because they are struggling to conceive on their own, or are unable to do so for various reasons.¹⁰⁷ The process of failed or lost pregnancies can be extremely emotional and taxing on the patient, already putting them in a vulnerable position before any procedure that may be done by the physician. To take advantage of a patient in such a physical way when they are already in a vulnerable state both emotionally and mentally is a clear violation of a relationship that society expects to be respected.

B. RAPE & SEXUAL ASSAULT

The patients of the physicians who commit fertility fraud are not only violated in their relationship with their physician but also victims of sexual assault.¹⁰⁸ Judith, one of Dr. Cline's patients

(Sally Ashby was told by Dr. Mortimer that he had inseminated her with a mixture of donor sperm and the sperm of her then husbands.).

¹⁰³Maderia, *supra* note 5 at 53.

¹⁰⁴*See*, Zhang *supra* note 32 ("Artificial insemination still requires an exchange of bodily fluids that can be procured only through sexual stimulation. To have your doctor masturbate in his office and then have that same doctor sit between your legs, injecting his sperm inside you – the edifice separating the clinical and the sexual breaks down completely."); Maderia *supra* note 5 at 52-3 ("But when a physician masturbates to produce a sample in one examination room and then immediately uses that sample to inseminate a patient in another room, the boundaries are blurred between the clinical procurement of a biological sample and the sexual touching associated with masturbation, orgasm, and ejaculation.")

¹⁰⁵Fox et al., *supra* note 55.

¹⁰⁶Maderia, *supra* note 5 at 51.

¹⁰⁷*See* Zhang *supra* note 32 ("Liz White and her husband had been trying to conceive for two and a half years by the time they sought Cline's help."); Rathke *supra* note 47 (Cheryl Rousseau and her husband sought help conceiving due to her husband's irreversible vasectomy.); Bellamy-Walker *supra* note 49 (Kelli Rowlette's parents sought help from Dr. Mortimer after they struggled to conceive on their own.).

¹⁰⁸*See* sources cited *supra* note 92.

whose child resulted from Dr. Cline's fraudulent acts, stated she felt like she had been raped, stating that the "touch following an orgasmic experience or ejaculation experience is much different" than touch that occurs from a medical procedure with medical thinking.¹⁰⁹ Another patient of Dr. Cline's, Liz White, stated after finding out the truth behind what happened "I felt like I was raped fifteen times."¹¹⁰

While a medical procedure, assisted reproductive procedures still requires an exchange of bodily fluids that can be procured only through sexual stimulation.¹¹¹ As discussed earlier, whether it be IUI or IVF, both procedures require the insertion of a tool into the uterus of the patient, exchanging either sperm or embryos in the process.¹¹² Texas legislator Stephanie Klick who sponsored the Texas law compared it like so, "there's a physical aspect to it – there is a medical device that is being used to penetrate these women to deliver genetic material... I equate it with rape, because there is no consent."¹¹³ Being impregnated by agreed-upon genetic material of another human being is one thing. However, when that genetic material is from a doctor who masturbates to produce a sample in one examination room and then completely uses that sample to inseminate a patient in another room, the boundaries are blurred between the clinical procurement of a biological sample and the sexual touching associated with masturbation, orgasm, and ejaculation.¹¹⁴ Aside from penetrating the patient through the insertion of medical equipment, the physician also penetrates the patient with his biological material when he implants into her uterine

¹⁰⁹Jody Lynee Madeira, *Holding Physicians Accountable for Fertility Fraud*, COLUM. J. OF GENDER & L., (forthcoming Spring 2020).

¹¹⁰Zhang, *supra* note 32.

¹¹¹*Id.*

¹¹²See *Intrauterine insemination (IUI)* *supra* note 10 (During the procedure the patient lies on the exam table with their legs in stirrups and a speculum is inserted into the vagina, then a vial of sperm is attached to a catheter which is then inserted and the sperm sample is pushed through the catheter into the uterus.); *In vitro fertilization (IVF)* *supra* note 11 (IVF requires insertion in two separate occasions. The first being during the egg retrieval which requires the insertion of both an ultrasound probe and a needle connected to a suction device into the ovaries to retrieve the eggs. The second during the embryo transfer where a catheter is inserted into the vagina with the embryos, which are suspended in a small amount of fluid, and placed into the uterus using a syringe.).

¹¹³Mroz, *supra* note 29.

¹¹⁴Maderia, *supra* note 5 at 52-3.

lining, and forms a placenta, breaching her physiological barriers in the most intimate way possible.¹¹⁵

C. PROCREATION & FAMILY RELATIONSHIPS

Freedom of personal choice in matters of marriage and family life is one of the liberties that the Supreme Court has found to be protected by the Due Process Clause of the Fourteenth Amendment.¹¹⁶ The fact that one's personal choice into how they choose to create a family reflects the value that society places on these very personal and private decisions. So, when a physician substitutes his genetic material, rather than that which was agreed upon by the patient and sometimes their spouse, they interrupt the right to create a family in a way which they choose.¹¹⁷ While in the early days of ART the patients were told very little, if any about the sperm donor, today donors are often required to disclose accurate information regarding their family and personal health histories and their behaviors, so that genetic and health factors that could affect the health or well-being of the offspring are known in advance.¹¹⁸ This is because when choosing donor sperm, the recipients of that sperm have interests in having healthy offspring and an uncomplicated rearing situation and typically want some degree of choice in the donor material they receive.¹¹⁹ One family victim to the fertility fraud described being "traumatized" when they found out their two children were not full siblings as they thought, but rather half-siblings with different fathers.¹²⁰

D. PERSONAL IDENTITY

Many, if not most, of the instances of fertility fraud, have come to light as a result of at-home DNA testing.¹²¹ From an attempt

¹¹⁵*Id.*

¹¹⁶*See Roe v. Wade*, 410 U.S. 113 (1973).

¹¹⁷*See* source cited note 103 *supra*.

¹¹⁸*Interests, obligations and, rights in gamete donation: a committee opinion*, 102 FERTILITY & STERILITY 675, 676 (2014).

¹¹⁹*Id.* at 676-7.

¹²⁰Fieldstadt, *supra* note 51.

¹²¹*See*, Zhang, *supra* note 32 ("The children Cline fathered with his patients now number at least fifty, confirmed by DNA tests from 23andMe or Ancestry.com."); Garrett, *supra* note 41 (Eve Wiley discovered that her mother's fertility doctor was her biological father after using 23andMe.com and Ancestry.com.); Rathke, *supra* note 47 (Cheryl Rousseau's daughter discovered Dr. Coates was her biological father after utilizing DNA testing.); Bellamy-

to either find out about their genealogy, seeking information about their biological father or to find out about their genetic history, at-home DNA testing kits used by victims of this crime were all done so in an attempt to know more about themselves and where they came from.¹²² Common interests of children who come from donor material include: being healthy and knowing what their health risks are so that preventive or protective measures might be taken; non-identifying medical information about their donors which is relevant to their own health and risk status; and non-medical information about their genetic origins and roots.¹²³

Whether or not conceived by ART, aside from one's medical identity, as human beings we frequently are curious as to where we came from. Sadly, the children born from fertility fraud are also left grappling with a lifetime of trauma, knowing their existence is not what their parents intended.¹²⁴ Since the early days of ART, donor insemination was done in secrecy, from a fear of doing psychological harm.¹²⁵ Heather Woock, one of the children resulting from Dr. Cline's fraudulent activities, is still working through the identity crisis which has come from discovering the truth of where she came from.¹²⁶ After having traced back her genealogy back up to Scottish royalty, she not only had to deal with losing the story she had written about who she was and how she came to be but also process that her parents had lied to her throughout her childhood, having found out then she was conceived through IVF.¹²⁷ The offspring of the doctors who commit fertility fraud are "living in an avoidable genetic disconnection from their fathers" according to Dr. Edward G. Hughes, OB-GYN.¹²⁸ Additionally, the trauma of discovering that one came to be in this world from such horrible actions will extend past the immediate offspring of the doctors who commit fertility fraud, to the children which those children have or

Walker, *supra* note 49 (Kelli Rowlette discovered Dr. Mortimer was her biological father after sending a DNA test to Ancestry.com.).

¹²²See, Zhang, *supra* note 32; Rathke, *supra* note 48; Garrett, *supra* note 42.

¹²³*Interests, obligations, and rights in gamete donation: a committee opinion*, *supra* note 119 at 677.

¹²⁴Ariana Eunjung Cha, *Fertility fraud: People conceived through errors, misdeeds in the industry are pressing for justice*, WASH. POST (Nov. 22, 2018, at 4:46 p.m.) https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/02550ab0-c81d-11e8-9b1c-a90f1daae309_story.html.

¹²⁵Zhang, *supra* note 32.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸Fieldstadt, *supra* note 51.

will have, knowing that their own DNA and that of their children and beyond, will always be linked to them and their actions.¹²⁹

V. PROPOSED SOLUTION

Fertility fraud is a unique crime as the victims include not only the patient who was assaulted during their treatment with their physician but also the children born as a result of the physician's conduct.¹³⁰ Currently, three states: California; Indiana; and Texas, have enacted legislation allowing actions for fertility fraud in either a civil or criminal manner in an attempt to provide some form of justice for these victims.¹³¹ This comment will discuss the laws of Texas and Indiana, then go on to propose what should be included in legislation that Florida should pass in order to punish past and deter future instances of fertility fraud.

A. INDIANA STATUTE

The statute concerning fertility fraud in Indiana allows for a civil cause of action against a physician who commits fertility fraud.¹³² The statute allows for an "action against a health care provider who knowingly or intentionally treated the woman for infertility by using the health care provider's own spermatozoon or ovum, without the patient's informed written consent to treatment using the spermatozoon or ovum" by the woman who gives birth to the child after being treated for infertility by a physician, the spouse of that woman, or the child born as a result of the actions of the physician.¹³³ Additionally, the spouse of a woman victimized by fertility fraud may bring a separate cause of action for each child that may have resulted from the physician's actions.¹³⁴ The law

¹²⁹*Id.*

¹³⁰*See supra* Part III and Part IV.

¹³¹IND. CODE ANN. § 34-24-5-2 (LexisNexis 2019); TEX. PENAL CODE ANN. § 22.011 (2019); While California does have legislation which makes it a crime to knowingly use and implant "sperm, ova, or embryos with the use of assisted reproductive technology for a purpose other than indicated by donor and into recipient who is not the donor without the donors written consent", this legislation seems to apply more to the misuse of donor material rather than the intentional substitution of the physicians genetic material without patient consent and therefore will not be discussed. *See* CAL. PENAL CODE § 367g (Deering 2020).

¹³²IND. CODE ANN. § 34-24-5-2 (LexisNexis 2019).

¹³³*Id.* § 34-24-5-2(A).

¹³⁴*Id.*

allows for all the victims of fertility fraud: the mother whom was the patient and violated by the doctor; their spouse who may have expected either their genetic material or that which they picked to be used; and of course the child who as a result of discovering the truth about where they came from is now left to deal with the feelings that come from discovering your identity is not what it was intended to be.¹³⁵ By not limiting who can bring the action, it allows for all those affected to seek justice. The statute sets out the damages that can be received as reasonable attorney's fees; the cost of the fertility treatment if brought under the portion of the statute which lays out a cause of action for the woman or her spouse or the resulting child as a result of treatment for IVF; and either compensatory and punitive damages, or liquidated damages of ten thousand dollars.¹³⁶

The Indiana state legislature included a discovery rule for those bringing a claim against a physician for fertility fraud.¹³⁷ Any party bringing an action for fertility fraud must not bring one later than ten years after the eighteenth birthday of the resulting child or if there is no child or the child does not reach the age of eighteen, no later than twenty years after the procedure in which fertility fraud occurred was performed.¹³⁸ The various instances of reported fertility fraud discussed above reflect that the occurrence is not discovered until sometime into the resulting child's life that the fertility fraud was discovered.¹³⁹ By allowing for a discovery rule in the statute of limitations for fertility fraud, the legislature attempts to limit the risk that victims could be prevented from bringing a cause simply because they were not aware they had a claim to bring.¹⁴⁰ Given the nature of fertility fraud, the discovery rule is nearly essential to ensure that the legislation can be utilized by those for whom it was created. The statute goes further to allow three more instances when a claim can be brought even if it is barred under the statute of limitation within five years of the earliest date at which one of the three happens: (1) when evidence sufficient to bring a

¹³⁵*See id.*, *See also supra* Part IV Sections B, C, and D.

¹³⁶§ 34-24-5-4.

¹³⁷*Discovery rule*, Bouvier Law Dictionary (2012) (defines discovery rules as "A discovery rule tolls the period of time allowed to commence action until the claimant learns of the facts of the conditions that give rise to the cause of action or until events occur that would give a reasonable person notice of the conditions giving rise to the action").

¹³⁸§ 34-11-2-15(a)(1)-(2).

¹³⁹*See* sources cited *supra* note 72.

¹⁴⁰*Id.*

claim is discovered through DNA analysis; (2) when a person becomes first aware of the existence of a recording providing evidence sufficient to bring a claim; or (3) when the defendant confesses to the crime.¹⁴¹ The provision which extends the time to bring a claim after it would otherwise be barred due to the discovery of evidence, especially that coming from DNA testing, truly reflects the legislation being customized to fit the nature of this offense, given that DNA testing is the main way in which fertility fraud is revealed.¹⁴²

B. TEXAS STATUTE

In contrast to the Indiana statute which creates a civil cause of action for fertility fraud, the Texas statute classifies fertility fraud as a form of sexual assault.¹⁴³ One form of sexual assault is defined as a person intentionally or knowingly causing the penetration of the anus or sexual organ of another person by any means, without that person's consent.¹⁴⁴ Texas has twelve definitions as to how this occurs without a person's consent, one of which stating it occurring when "the actor is a health care services provider who in the course of performing an assisted reproduction procedure on the other person, uses human reproductive material from a donor knowing that the other person has not expressly consented to the use of material from that donor."¹⁴⁵ The language of the Texas statute is specific to go on to describe the conduct which occurs when fertility fraud is perpetrated.

C. PROPOSED FLORIDA LEGISLATION

Given that Florida's current laws are inadequate to provide adequate relief for victims and the appropriate punishment and deterrent for perpetrators, new legislation would need to be enacted and current legislation would need to be changed or amended.¹⁴⁶ The crime of fertility fraud encroaches into many aspects of public

¹⁴¹§ 34-11-2-15(b)(1)-(2).

¹⁴²*See* Mroz *supra* note 29 ("Patients may sidestep the statute of limitations in these cases, bringing legal action up to five years after the fraud is discovered rather than after it took place. That provision is significant to accusers, because those who discover the identity of their biological fathers in these cases are usually adults.").

¹⁴³*See* TEX. PENAL CODE ANN. § 22.011(b)(12) (2019).

¹⁴⁴*Id.* § 22.011(a)(1)(a).

¹⁴⁵*Id.* at § 22.011(b)(12).

¹⁴⁶*See* discussion *supra* Part III.

policy such as the privileged physician-patient relationship; the violation of a female's reproductive anatomy; the disruption of one's choice and control over their creation of a family; and a person's sense of self.¹⁴⁷ Given the severe impact on public life, changes should be made to Florida law to ensure that it is possible for victims of this crime are adequately served by our justice system. In this section, the new proposed legislation will be discussed that should be introduced creating a civil action for fertility fraud, followed by a discussion of how the current legislation could be amended to accommodate the shortcomings which make them insufficient for fertility fraud.

i. New Legislation Should be Enacted in Florida Which Creates a Civil Cause of Action for Fertility Fraud Which Allows for Compensatory and Punitive Damages

Pulling inspiration from the legislation enacted in Indiana, Florida should create a civil cause of action to provide compensatory damages to the victims of fertility fraud, accompanied by punitive damages in the form of fines which would go to various organizations associated with ART.

Similar to that which exists in the state of Indiana, the legislation enacted by Florida should allow for actions to be filed by the mother and former patient, the spouse of the mother, and the children which result from fertility fraud.¹⁴⁸ The Indiana statute states a "surviving spouse" of the woman who was treated may bring an action, implicating that the mother must be deceased for the spouse to bring a cause of action.¹⁴⁹ Florida's legislation should not require the spouse be surviving but rather allow the spouse to bring the claim regardless as to if the mother is alive or not. This should be especially true in cases in which it was the spouse's genetic material which was to be used but was instead substituted with the physicians. In cases such as these, the spouse has been deprived of the opportunity to have a child which is biologically their own.

The legislation would need to define fertility fraud in some manner to ensure there is no confusion between the intentional substitution of a patient consented genetic material without the patient's consent; and when a physician uses genetic material which

¹⁴⁷See discussion *supra* Part IV.

¹⁴⁸See, IND. CODE ANN. § 34-24-5-2 (LexisNexis 2019).

¹⁴⁹See *Id.* § 34-24-5-2(A)(3).

is different from that which the patient consented to unintentionally.¹⁵⁰ In a sense, the intentionality and the secrecy involved in fertility fraud is what creates the greatest sense of betrayal and violation. Due to this, it is imperative legislation be clear that the act of fertility fraud is an intentional act done by a physician in which they inseminate a patient with their genetic material without the patient's full knowledge and informed consent during treatment for infertility while attempting to impregnate the patient.

No amount of monetary damages could be adequate repayment for the sense of violation felt by the patient and resulting child after discovering the actions of the physician. Nevertheless, the legislation should allow for some sort of compensatory damages. Additionally, the statute should allow for fines to be issued against the physician. These fines should be paid towards things such as ethics training for physicians; funding for regulation of ART to create a more uniform system with better checks and balances to prevent from this type of fraudulent behavior from occurring further within the field, or to fund public mental health treatment for children and adults who suffer from childhood trauma as a result of the physician's fraudulent actions.¹⁵¹ By having the fines go toward programs such as these will hopefully help to prevent further acts such as these from occurring within the medical community, help to rectify some of the shortcomings which currently exist in the ART field, as well as help to those suffering from trauma similar to that caused upon the victims of this crime.

Additionally, in order for this legislation to provide an adequate remedy for the victims of this crime, it will require that the statute of limitations is extended enough to provide the children, mother, and the mother's spouse to become aware of the fraud and bring a claim.¹⁵² The Indiana legislation provides quite an extended time

¹⁵⁰By making the language specific, the legislature could provide some level of protection for physicians who do not intentionally use sperm not consented to by the patient from this particular offense. The goal of this proposed legislation ultimately should be to be able to seek relief from the intentional use of the physician's genetic material without the patient's consent, not an unintentional, negligent mistake. *See, Mroz, supra* note 29 (Lead of the ethics committee of the American Society of Reproductive Medicine discussing concerns about the language of the Texas statute possibly causing a physician who was "rushed and inattentive" accidentally grabbing the wrong vial, leading a jury to ultimately convict that physician causing a "simple mix up" leading to a "conviction as a sexual predator" and a fear fertility doctors in Texas will stop practicing.)

¹⁵¹*See* discussions *supra* Part III Section B and Part IV Sections A, B, and D.

¹⁵²*See* discussion *supra* Part III Section A 1, 2, and 3.

period, with a generous discovery rule, and even specifically mentions the discovery of the crime by DNA analysis, which is how almost all reported instances of fertility fraud have been discovered.¹⁵³ As such, the Florida legislation should model the Indiana legislation regarding the statute of limitations discussed above.

ii. *Florida Should Modify the Current Sexual Battery Statute to Better Accommodate to the Nature of the Crime of Fertility Fraud*

As previously discussed, the nature of the crime of fertility fraud is an extremely invasive one and violating to the patient upon which the act is committed. In an attempt to deter possible future offenders, along with to punish those doctors who have violated their patients, Florida should modify the current statute for sexual battery.¹⁵⁴ This would include either: (1) taking out the provision excluding those acts which fit under the definition but are done for a “bona fide medical purpose” or creating a new definition of sexual battery which includes fertility fraud as an exception to the general “bona fide medical purpose” exception and (2) altering the statute of limitations to allow for claims of sexual battery arising from fertility fraud.¹⁵⁵

In reviewing the current legislation in Texas which created a separate definition of sexual battery which described fertility fraud, this same concept should be used by Florida to create an exception to the general rule which excludes acts which would qualify as sexual battery but for the fact they are done for a bona fide medical purpose.¹⁵⁶ By keeping the current exclusion of acts done for a bona fide medical purpose and simply providing an exception, the protections which that phrase provides would remain in place as the legislature intended. A specific description, perhaps similar to what should be included in the civil action for fertility, should be included and it should be indicated that any form of sexual battery which occurs under these conditions are not be considered as done for a bona fide medical purpose, which would prevent a perpetrator from being shielded by that provision. The statute of limitations would need to be changed as well, to create an exception for instances of

¹⁵³See discussion *supra* Part V Section A.

¹⁵⁴See FLA. STAT. ANN. § 794.011.

¹⁵⁵See discussion *supra* Part III Section B, 1.

¹⁵⁶See TEX. PENAL CODE ANN. § 22.011(b)(12)

sexual battery arising from fertility fraud which comply more with the nature of the crime.¹⁵⁷ It would need to allow an action to be brought within a certain amount of time within the discovery of the fraud, and perhaps putting an absolute limit on the time in which a claim can be brought from the date that the fraud occurred.¹⁵⁸ If this were done, however, the time would have to be lengthy, to allow time for the victims to discover the fraud.

VI. CONCLUSION

Fertility fraud is a modern crime and like many other developments in society, the law has not been quick to catch up. The field of artificial reproductive technology itself has been slow to be accepted by society as a whole, as well as slow to be regulated and have standards and uniformity implemented throughout the field. When analyzing the history of the field and the treatment of ART, it may be easy to see how physicians such as Dr. Cline were able to get away with violating their patients' trust and substitute donor sperm for their own without the consent of their client for so long. However, the prevalence of at-home DNA testing revealed a secret that dozens of doctors likely thought would never come to light and turned the lives of hundreds upside down.¹⁵⁹ While there is no known number as to the exact victims of fertility fraud and the number of children that has resulted from these physicians actions, there is likely no way at this time to gauge this number. Given not only the nature of the crime taking long to discover after it has occurred, the stigma behind fertility treatment being something that has been kept secret since its inception; the lack of records that may remain to help identify victims; and the reluctance of victims to come forward due to lack of remedies are likely forces which are preventing the true gravity of this crime to come to life. The crime of fertility fraud strikes a chord with the ideas of morals, trust, and privacy that are prevalent in our society today, that for long have been held dear. Trust in a treating physician to put the patient first

¹⁵⁷See discussion *supra* Part III Section B 1; See also discussion of discovery rule in IND. CODE ANN. § 34-24-5-2 *supra* Part V Section A.

¹⁵⁸See, IND. CODE ANN. § 34-11-2-15.

¹⁵⁹See, Garrett *supra* note 42 ("For many years, doctors or whoever did this didn't think there was anyway of getting caught. With advances in genetics, these kits that you can do at home and its very inexpensive that wort of opened up people's eyes about what may have been happening."); Zhang *supra* note 32 ("In the 1980s, before anyone dreamed up mail-in DNA tests and internet genealogy sites, Cline must have thought no one would ever find out.").

and to adequately inform them so that they may make an informed decision regarding the treatment of their body; the right and option to control how one creates a family, whom it is created with, and if it is created at all; and having a solid sense of self-worth and identity are all violated when a physician commits fertility fraud.

Fertility fraud is a crime which significantly affects the lives of its victims, but yet is punishable at this time in only three states. Currently, the laws in Florida do not provide adequate protections and punishments for this crime, leaving the potential that some citizens may not be able to obtain adequate justice. Changes to Florida's current laws, including the addition of a civil cause of action for fertility fraud, creating an exception to the current sexual battery statute, and modifying statutes of limitations could create the necessary changes to protect the victims of this crime which affects the future generations to come from the victims.